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Supreme Court of the United States

October Term, 1958

No. 604 MISC.

GRACE FRANK, Administratrix ad prosequendum of the Estate of DANIEL FRANK, deceased,
Petitioner,

against

UNITED STATES OF AMERICA, DANIEL F. KOWALSKI and CHARLES JANUSCZ,
Respondents,

and

DANIEL F. KOWALSKI, CHARLES JANUSCZ and the Cabin Cruiser SEA CAPTAIN, formerly known as the ORION, her engine, tackle, etc.,
Respondents-Impleaded,

and

PAUL F. ZISA, Claimant of the Cabin Cruiser, SEA CAPTAIN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LOUIS R. HAROLDS,
Attorney for Petitioner.

MORRIS F. PEARLMAN,
and
STANDARD, WEISBERG, HAROLDS & MALAMENT,
of Counsel.

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PAUL F. ZISA, Claimant of the Cabin Cruiser, SEA CAPTAIN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Grace Frank, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, filed December 16, 1957. This judgment affirmed an order of dismissal by Judge Alfred E. Modarelli, sitting in Admiralty without a jury, in the District Court of New Jersey. There were two separate opinions by the Tria' Court. The first opin-

ion was filed on January 2, 1957, and it recognized that there was a conflict between the circuits, and that the subject matter had been discussed in legal periodicals. It announced, apparently with some reluctance, that its decision was based solely on the "public policy" reasons enunciated by the Court of Appeals for that circuit in *P. Dougherty Co.* v. *U. S.*, 207 F. (2d) 626 (C. A. 3rd, 1953), cert. den. 347 U. S. 912. The second (supplemental) opinion was filed by the Trial Court on March 1st, 1957, with the announced intention of making the record of findings as complete as possible, in order that the case might be "more thoroughly presented on appeal". These opinions, not officially reported, are made a part of the appendix to this petition, as is the opinion of the Court of Appeals for the Third Circuit.[1]

In the *Dougherty* case, the Third Circuit had ruled that for reasons of "public policy" the government could not be held liable for acts of negligence by Coast Guard personnel, when the acts of fault arise during time of stress at sea. In the instant case, governmental immunity from tort liability was extended even further by the Court below, by absolving the government of liability for death caused during a rescue, as a result of the following acts of "gross negligence" (so labelled by the Trial Court) by the Coast Guard personnel ashore while acting on an operational level, without stress:

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[1] It is noted that the Court of Appeals' decision herein alleges that the District Court found for the United States "on the ground that the plaintiff had not carried her burden of proving that the attemped rescue failed because of any of the faults of the Coast Guard. We agree that the United States was entitled to judgment, but place our affirmance on a different ground". We assume that this statement by the Court of Appeals, as to the "ground" for the District Court's decision was inadvertent, since the Trial Court, in its opinion, stated: "After a thorough analysis of the facts and counsels' arguments, the court is convinced that the public policy reasons enunciated in the Dougherty case apply here."

A—Keeping and operating a lifeboat (Coast Guard 36363) at the Sandy Hook Rescue Station, with known defective reverse mechanism for over six months, without adequate repair or replacement;

B—Failure to examine the lifeboat ashore adequately during the morning inspection, with the result that the overly-secured life rings thereon could not be gotten free to be thrown to the man in the water while he was still afloat and could have been saved; and

C—Failure to man the lifeboat in accordance with the required Coast Guard complement, when adequate ratings were available at the rescue station for that purpose.

It is respectfully urged that the view taken by the Third Circuit in its interpretation of the applicable statutes, unduly restricts the waiver of sovereign immunity therein, and the need recognized by this and other courts for applying liberal construction to carry out Congressional intent.

This decision by the Third Circuit conflicts with the decision of another circuit (*U. S.* v. *Lawter*, 219 F. (2d) 559 (C. A. 5th, 1955), as well as with the rationale underlying important rulings by this Honorable Court, both in a decision which followed the trial of this suit (*Indian Towing Co. Inc.* v. *U. S.*, 350 U. S. 61, 76 Sup. Ct. 122 1955)), as well as in an earlier opinion (*Canadian Aviator Ltd.* v. *U. S.*, 324 U. S. 215, 65 Sup. Ct. 639 (1945)).[2]

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[2] The tort having been consummated on maritime waters, the cause of action survived under the state death act, and contributory negligence, if any, would not be a complete bar.

Skovgaard v. *The Tungus*, — F. (2d) — (C. A. 3rd, 12-23-57);

Halecki v. *United New York and New Jersey Sandy Hook Pilots Association*, — F. (2d) — (C. A. 2nd, 1-10-58);

O'Leary v. *U. S. Lines Company*, 215 F. (2d) 708 (C. A. 1st, 1955).

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1).

Statement of the Case

Daniel Frank was 27 years of age, unmarried and in good health. He had been working as a laborer, with take-home pay of about $55.00 per week. He did not have a fiancee, and lived with his parents.

Out of his earnings, he contributed about $30.00 a week towards the support of his parents and his seven younger brothers and sisters, who were all minors, ranging from 6 years of age up to 19 years of age. His father was employed as a guard for the American Can Company earning $55.00 a week, and his mother remained home and cared for the family. It is undisputed that until Daniel Frank died, his parents and seven younger brothers and sisters were partially dependent upon him for pecuniary support.

On the morning of June 7th, 1952, one Charles Januscz, accompanied by Daniel Frank and the latter's younger brother Patsy, left for a fishing trip on a 30-foot cabin cruiser, known as the Orion. The waters were calm, it being a warm, sunny Saturday morning. The Orion was operated by Januscz, with the Frank brothers as passengers on this, their first visit on the boat. Other pleasure craft were also in the vicinity. However, as the day progressed it became more windy, and the Orion was therefore headed back to the New Jersey shores, proceeding towards Sandy Hook.

While the Orion was thus headed back, in the vicinity of Sandy Hook channel, in the navigable waters of the United States, its engine went dead, and its operator, Charles Januscz, caused it to be anchored about 300 to 400 yards off Sandy Hook, near buoy 13.

This occurred shortly before 2:30 P. M. At about this time, the Coast Guard tower at the Sandy Hook Lifeboat Station reported seeing the ORION, as it was bobbing about, at anchor. Coast Guard Lifeboat 36363 was dispatched to undertake the tow of the disabled ORION and its occupants to shore. A smaller Coast Guard boat there was not dispatched, nor were other Coast Guard boats, which were in the waters in the vicinity, and with which the station maintained radio contact.

The Coast Guard report of assistance, which was received in evidence, shows that at this time, ceiling and visibility were unlimited for eight miles; that the wind was blowing at twenty-four miles per hour which, according to the undisputed testimony, was in the category of a moderate to strong "breeze"; that it was blowing in a west northwesterly direction; that there was a northwestern sea and swell of four feet in height; and that the temperature was 79 degrees. All the witnesses agreed that it was a sunny day.

The customary and standard complement of Coast Guard vessels such as the Coast Guard 36363 consisted of a boatswain's mate, an engineman and a seaman, with the boatswain's mate in charge; but concededly, no boatswain's mate was sent out on the Coast Guard 36363 on this occasion, although boatswain's mates were available, nor were the usual qualified ratings assigned.

When the Coast Guard 36363 came upon the ORION, Charles Jannuzo and Daniel Frank, appeared to be quite safe. They were seated in the afterpart of the cabin cruiser, while the younger Patsy Frank, unknown to the Coast Guard, was seasick, in the cabin of the ORION.

Both the ORION and the Coast Guard 36363 were equipped with life belts, but neither the occupants of the ORION nor of the Coast Guard boat, wore life belts; no one ordered or requested that life belts be donned; and none

of the occupants on any of the other pleasure craft in the vicinity apparently deemed it necessary to don life belts.

Acting under the direction of the Coast Guardsmen, Daniel Frank and Charles Januscz came towards the forward part of the Ozinx and received a tow line from the Coast Guard 36363. They had no reason to suspect that this vessel, its equipment or crew were in any way inadequate, and changed their position to carry out the orders given them. The tow line was then secured to a cleat which was in the forward part of the Ozinx, while the other end of the line was secured to the Coast Guard boat.

Daniel Frank then proceeded back aft, via the port side of the Ozinx, while Charles Januscz proceeded back aft via the starboard side of the Ozinx. The aft part of the Ozinx was the most protected part of the cabin cruiser; and in going back, each of the men carefully held on to the railings which were located on top of the side of the Ozinx's cabin for support. The Coast Guard 36363 had meanwhile began to tow the Ozinx slowly, when suddenly the seas caused the Ozinx to roll to one side, with the result that Daniel Frank, still holding on to the port side handrail, as he was making his way aft, fell overboard when the handrail gave way under his weight. He fell into the sea with the handrail still clutched in his hands.

The government's evidence fully corroborated that Daniel Frank was able to swim to a limited extent, having passed certain tests while in the United States Navy. Nevertheless Charles Januscz jumped overboard, and assisted Daniel Frank to remain afloat in the water till they could be reached by the Coast Guard vessel. The Coast Guardsmen testified that both men remained above water, swimming, waiting to be rescued.

The Coast Guard 36363, meanwhile, undertook to rescue the two men in the water. After being afloat for some time, Charles Januscz was saved, but Daniel Frank was drowned after going down for the third time.

The "Report of Assistance" which is in evidence[4] was made up by the Coast Guardsmen in charge of the Coast Guard 36363 within 24 hours following this occurrence, and it was duly endorsed and approved by their commanding officer at the Sandy Hook Coast Guard Lifeboat Station; and it was there duly noted that Daniel Frank's loss of life was, in their opinion, due to (1) the giving way of the Union's handrail; (2) the defect in the reverse clutch of the Coast Guard 36363; and (3) the inability of the Coast Guardsmen to get the life ring to the man in the water at the time when he could have been rescued.

It was admitted at the trial that the deficiencies and unreliability of this reverse clutch mechanism were well known not only to Coast Guard personnel at the Sandy Hook Lifeboat Station; but also to their superior officers there, for six or more months prior to this accident of June 7, 1951. This was even admitted by Mr. Hacker, the officer in charge of this lifeboat station, who had to concede that this constituted a known serious hindrance to the operational efficiency of his Coast Guard unit at the Station at Sandy Hook.

In the Coast Guard's quarterly Boat Machinery Hull and Expense Report, dated March 31, 1952, i.e., more than two months prior to the accident herein, it was again reported by the personnel at the Sandy Hook Coast Guard Station that this reverse clutch of the Coast Guard 36363 was still not reliable and that attempts to tighten it did not help; but still the defects in this boat were not repaired,

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[4] This "Report of Assistance", which is in the record, is not to be confused with the Coast Guard Investigation Report which was not part of the record. In the Court below, respondent nevertheless attempted to bolster its position by several references to the purported Coast Guard Investigation Report, which was based on a unilateral inquiry with incomplete evidence, although it was neither offered nor received as part of the evidence in this case.

and the defective boat was continued in operation without being replaced.

On May 29, 1952, i.e., about a week prior to the accident herein, the commanding officer of the Sandy Hook Lifeboat Station wrote a letter to the Commander of the Third Coast Guard District, calling attention to the fact that the Coast Guard 36363 had had these defects for the past six months, that the repairs and/or replacements which were supposed to have been made six months previous, in December, 1951, were still seriously needed; but nevertheless the boat was continued in operation, without providing appropriate repairs or a replacement as before.

In addition, the undisputed testimony at the trial showed that the life rings aboard the Coast Guard 36363 had been previously secured ashore improperly, so that they could not readily be gotten free by the Coast Guardsmen when needed during this emergency. The supervisory Coast Guard personnel (assigned to inspect the station's boat and its gear ashore at 8 A. M. on the morning of June 7, 1952), had admittedly failed to discover that these life rings had been improperly secured.

Plaintiff contended at the trial that it was reasonably foreseeable that this very craft might well be called upon, as it indeed was here, to engage in a towing and/or rescue operation, that it was reasonably foreseeable that the success of its mission might be dependent upon its being properly manned, with full control and maneuverability, and with life rings available and accessible for instant use, and the Trial Court so found. The Coast Guard 36363 was found by the Court to be in such condition on June 7, 1952, as to constitute fault and unseaworthiness. The Coast Guardsmen at the rescue scene testified that in their opinion, had it not been for this fault, negligence and unsea-

worthiness, Danny Frank would have been saved and alive today.[4]

Nevertheless, about half way through the trial of this suit, Judge Modarelli expressed the opinion that the "public policy" underlying the Court of Appeals' decision in *P. Dougherty Co.* v. *U. S.*, *supra*, bound him, so as to require that the libel herein be dismissed. On appeal, the Court of Appeals for the Third Circuit, affirmed on authority of the same case, but as stated above, on the different ground that no duty was owed under the Public Vessels Act 46 U. S. C. § 781 and/or Federal Tort Claims Act (28 U. S. C. §§ 1346(b), 2674).

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[4] In addition, Coast Guardsman Bauer also testified at pp. 200-201) as did Coast Guardsman Recker (at p. 109) that when they came on the scene with the defective Coast Guard 36363, Danny Frank and his companion were seated safely in the ORION, with the anchor holding fast. It is therefore clear that the action of the Coast Guard changed his position for the worse, in removing him from a position of safety, while at the same time, barring other pleasure craft and Coast Guard vessels, which could otherwise have been at the scene within a minute or two. Respondent attempted to indicate that the ORION was in considerable danger, calling attention to testimony by Coast Guardsman Recker at p. 111, where he stated, on cross-examination, that there was nothing more than a "possibility" that the ORION might capsize, as distinct from a probability; but the Trial Court indicated that it could not give much weight to such an answer. The respondent also relied on pp. 226-227 and p. 249 of the record in an attempt to show danger. But pp. 226-227 refer to testimony by Coast Guardsman Bunting who was not present during the rescue operation and who did not even see the ORION or the accident; while p. 249 refers to testimony by Coast Guardsman Hacker, who likewise did not see the ORION or the accident, and who had conceded at p. 247 that he was not even at the Coast Guard station at the time of the accident.

Questions Presented

I

The holding by the Court of Appeals for the Third Circuit herein, is in conflict with a decision by the Court of Appeals for the Fifth Circuit and is inconsistent with the rationale underlying decisions of the United States Supreme Court.

As stated, the Trial Court felt bound by the *Dougherty* case, in which it was held as a matter of public policy, that the Coast Guard should not be held liable for damages resulting from its negligence occurring during a rescue operation in time of stress "at sea". This was affirmed on the appeal herein on a different ground, but relying on the same authority, *i.e.*, that under the *Dougherty* case, the Coast Guard owed no duty to Frank, even though the Trial Court herein had found that the loss of life here occurred because the Coast Guard was guilty of gross negligence ashore, in failing to adequately repair, maintain and equip the Coast Guard 36363.

In contrast with this holding, in *U. S.* v. *Lawter*, 219 F. (2d) 559 (C. A. 5th, 1955), the Fifth Circuit had refused to follow the *Dougherty* case. In *U. S.* v. *Lawter*, the Coast Guard was held liable for the failure to assign an experienced available man to perform a rescue at sea, with resulting loss of life. The Court there held that having undertaken the rescue operation, the Coast Guard was bound to act without negligence, or else be liable for the ensuing damages. The latter case was filed under both the Public Vessels Act and the Federal Tort Claims Act, as was the suit at bar.

In *Canadian Aviator Ltd.* v. *U. S.*, *supra*, the government was held liable under the Public Vessels Act for damages caused by the negligence of a public vessel and

its crew during the course of a towage-type of operation made at sea, also without charge, which resulted in damage to the privately owned craft which had relied upon the public vessel for assistance.

Following the trial of the within case, this Honorable Court rendered its decision in *Indian Towing Co. Inc.* v. *U. S.*, *supra*, wherein it refused to apply technical, restrictive distinctions, holding that the government could be held liable for damages for the negligent maintenance and operation of a lighthouse by the Coast Guard. Note 1 of this Honorable Court's opinion in that case cited Lawter with approval, while Dougherty was not even mentioned.

This conflict between the Third and Fifth Circuits involves an important question which should be resolved by this Honorable Court, since the reviewing Court below held herein that there was no duty creating relationship, so as to give rise to liability, notwithstanding the government's fault. It is respectfully submitted that this conflicts with the *Lawter* case, and with the rationale of the *Indian Towing* and *Canadian Aviator* cases.

II

When the Coast Guard establishes a lifeboat rescue station, may the government be held liable in damages for death to a civilian during a rescue operation, resulting from acts of gross negligence by the Coast Guard ashore, on an operational level under the Public VesselsAct and/or the Federal Tort Claims Act?

The rationale underlying the *Indian Towing* case, the *Canadian Aviator* case and the *Lawter* case, all *supra*, indicate that a duty to exercise care was created when the government undertook to provide a rescue service station at Sandy Hook, New Jersey, and even more particularly, when it undertook to go to the aid of the dis-

abled boat, taking it under its wing, in tow. Until then the *Orion* had been safely at anchor with its occupants only 400 yards away from the Sandy Hook station. They had a right to expect that a properly equipped, manned and seaworthy craft had been sent out by the Coast Guard to aid them. Instead, they were met by the Coast Guard 36363, which thereby excluded others from coming to the assistance of this boat and its occupants, with fatal results, as in *Lawter*.

When the Coast Guard undertook a helicopter rescue mission at sea (*Lawter* case), and the operation of a light-house service (*Indian Towing* case), and when a public vessel simply directed a privately owned ship as to how to proceed (*Canadian Aviator* case), the Courts held that the government was bound to exercise reasonable care for the protection of persons or vessels in need of aid, or else be liable in damages. In this case, all the eye witnesses, all of whom were Coast Guard personnel, agreed that Frank would have been alive today, had it not been for the (a) known defective steering mechanism of the Coast Guard rescue vessel (b) improperly secured life rings on the Coast Guard vessel so that they could not be gotten free when needed to rescue the man in the water and/or (c) the Coast Guard vessel which was manned in violation of the required complement. Within minutes following the occurrence a swarm of properly manned and seaworthy Coast Guard rescue vessels were on the scene, having been easily contacted by radio.

The Federal Government has authorized the Coast Guard to undertake the saving of life and property pursuant to 14 U. S. C. Sections 2 and 88. Under these sections the Coast Guard may perform any and all acts necessary to rescue and aid persons, and protect and save property. The Coast Guard may engage in saving life and property in the broadest possible terms, without limitation as to place.[5]

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[5] Historical note Section 14 U. S. C. A., *supra*.

Acting under this authority, the Coast Guard set up a lifeboat rescue station at Sandy Hook.

In the case at bar, the District Judge found as a fact, that the Coast Guard personnel responsible for the operational efficiency of that station, were grossly negligent in improperly equipping, maintaining and manning this particular rescue vessel, which acts of negligence took place ashore on an operational level. Thus, the "public policy" with reference to standards of conduct applicable in times of stress at sea, as enunciated in the *Dougherty* case, would in any event seem to be inapplicable.

Therefore, appellant should have had a right of recovery, unless, as the Court of Appeals herein stated, no duty of care is owed by a government which undertakes to operate a rescue station, but then does so in such a negligent and careless manner, due to operational negligence ashore, that a life is lost.

The Court below found that the applicable legislation (14 U. S. C. Section 88) falls short of creating a governmental duty of affirmative action owed to a person or vessel in distress. What the Court of Appeals for the Third Circuit perhaps failed to appreciate was that a duty of care is owed once the government sets up a Coast Guard rescue station, and once a rescue service is undertaken. In *Indian Towing Co. Inc.* v. *U. S.*, *supra*, this Court recently said:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning." (p. 69)

In his supplemental opinion, in the case at bar, District Judge Modarelli stated that had it not been for the

Coast Guard's shoreside gross negligence and unseaworthiness, the deceased "might have been saved", citing only cases in which causal relationship was found, although necessarily based on speculation. He reluctantly followed the *Dougherty* rule of his Circuit, rather than the *Lawter* rule. On appeal, the Court of Appeals for the Third Circuit also recognized the negligence and fault of the Coast Guard, but nevertheless it based its refusal to find liability on the ground that no duty was owed by the government. This Court should decide whether such a duty is, or is not, owed under such circumstances.

In *Chicago, Rock Island & Pacific R. Co.* v. *Goodson*, 242 F. (2d) 203 (C. A. 5th, 1957), it was held that one need not prove that the negligent act of a defendant was the sole proximate cause for the accident. Recovery may be had on a showing that it was reasonably foreseeable that a chain of causation might be established in which a defendant's negligence, combined with other events, might cooperate in causing the resulting injury. In the instant case, the Trial Court found as a fact that the incident which had occurred was foreseeable.

Reasons for Granting the Writ

1. The decision herein is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *U. S.* v. *Lawter*, *supra*, and is inconsistent with the rationale underlying this Honorable Court's decisions in *Indian Towing Co. Inc.* v. *U. S.*, *supra*, and *Canadian Aviator Ltd.* v. *U. S.*, *supra*.

2. The Coast Guard, pursuant to authority granted by 14 U. S. C. A. 88 undertook to establish and maintain a lifeboat station at Sandy Hook, New Jersey. This Court should determine whether, under the Public Vessels Act and/or the Federal Tort Claims Act, the government may be held liable for damages resulting from acts of gross negligence by the Coast Guard ashore on an operational level, in furtherance of the activities of such a station.

3. The case of *P. Dougherty Co.* v. *U. S.*, *supra*, which formed the basis of the opinions for the Courts below, has not been recognized as a satisfactory determinant of the question as to when liability is to be imposed upon the Coast Guard for its negligence or fault in effecting rescues of both life and property.[6]

WHEREFORE, your petitioner prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled case, to the end that said cause may be reviewed and determined by this Court as provided by law, and upon said determination to reverse the judgment of the Court of Appeals and direct that judgment be entered accordingly, or for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York,
March 13, 1958.

Respectfully submitted,

LOUIS R. HAROLDS,
Attorney for Petitioner.

MORRIS F. PEARLMAN,
and
STANDARD, WEISBERG, HAROLDS & MALAMENT,
of Counsel.

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[6] See Gilmore & Black, "The Law of Admiralty" (1957), pp. 459-460, wherein the *Dougherty* case is referred to as an "unconvincing" decision involving a rescue at sea. That decision was also criticized in "Liberal Construction and the Tort Liability of the Federal Government", by Prof. Seavey, 47 Harvard L. Rev., pp. 994-996 (1954) and 14 N. A. C. C. A. Law Journal, pp. 405-407.

APPENDIX

Opinion

MODARELLI, District Judge:

Libellant, as administratrix ad prosequendum, brings this suit in admiralty and under the Federal Tort Claims Act, Title 28 U. S. C. § 1346(b), seeking damages for the death of her son. She joined as respondents the United States of America, Daniel S. Kowalski, the then owner of the Cabin Cruiser Orion, and Charles Januscz who operated the said Cabin Cruiser on the day that Daniel Frank met his death and who was never served. The United States then impleaded the respondents, Daniel S. Kowalski, Charles Januscz, and the Cabin Cruiser Sea Captain, formerly known as the Orion, now owned by Paul Frank Zisa and known as the Sea Captain. She claims that his death was caused by negligence on the operational level of the Coast Guard in the conduct of a sea rescue. Specifically, she charges that the Coast Guard Cutter used in the rescue was unseaworthy because it had a defective reverse mechanism, improperly secured life ring, and was improperly manned, all of which occurred on the shore and not at the time of the rescue at sea. I shall concern myself only with her claim against the United States for reasons which will hereinafter appear.

The evidence discloses that on June 7, 1952, at about 2:30 p. m., the Coast Guard look-out tower at Sandy Hook, New Jersey, reported to the Coast Guard Life Boat Station that a cabin cruiser, which later proved to be the Orion, was in distress off Sandy Hook. The Orion was owned by respondent Kowalski, now known as Stevens, and was being operated by the respondent Januscz, apparently with Kowalski's consent, although Kowalski was not on board the vessel that day. Those in charge of the life boat station immediately dispatched the only Coast Guard vessel then available, Coast Guard Cutter 36363, to the assistance of the Orion.

The sea was rough and choppy under a strong northwest breeze. The evidence further disclosed that the strong gusty winds which kicked up the rough choppy sea that day caused many small vessels to fill the air with distress calls and gave the Coast Guard Service a busy afternoon. The other Coast Guard vessels attached to the life boat station were all out on emergency calls and the one that was dispatched was the only one available at the time. In addition to Daniel Frank and Charles Januscz, Frank's younger brother Patsy was aboard the Orion but was not on deck because of indisposition. He was in the cabin. They had been on a fishing party and as usual there was evidence of consumption of sandwiches and beer on board the Orion.

On arriving alongside the Orion, the crew of the Cutter passed a tow line which was secured to the Orion by Daniel Frank, libellant's intestate, and respondent, Charles Januscz, who were on the forward deck of the Orion without life jackets, although there were life jackets on the vessel. The Cutter commenced towing the Orion at slow speed toward the life boat station. Januscz went to the Orion's cabin to steer this vessel, and shortly thereafter Frank proceeded aft along the open deck of the Orion toward the cabin. While Frank was on his way he grasped a handrail of the Orion's cabin and as the Orion lurched or rolled under a wave, the railing tore loose from the cabin roof and Frank was thrown into the water. Thus, a change in conditions converted a "towage operation" into a "rescue operation." Respondent Januscz dove after Frank who could not swim, although he had served in the United States Navy. The crew of the Cutter immediately cut the tow line and made every effort possible to rescue Januscz and Frank who were struggling in the water. Januscz was rescued but Frank was drowned. It appeared that the crew of the Cutter exercised all of the skill and learning which they possessed to effect the rescue of both Januscz and Frank.

During the trial the court granted the United States' motion to exclude evidence relevant to the negligence of the Coast Guard during the rescue operation. The court relied upon *P. Dougherty Co.* v. *United States*, 207 F. 2d

626, 634 (CA 3 1953), cert. denied, 347 U. S. 912 (1954),* which held that "* * * public policy dictates that the United States should not be liable for fault of the Coast Guard in the field of rescue operations."

Libellant requested the court to reconsider its decision. After the trial there was oral argument, written briefs, and letter-law memorandums that exhausted and presented every possible contention in favor of the libellant on the issue of negligence in rescue at sea cases. The only case presented in which a recovery was had in such a case was *United States* v. *Lawter*, 219 F. 2d 559 (CA 5, 1955). Certiorari was not applied for. After a thorough analysis of the facts and counsels' arguments, the court is convinced that the public policy reasons enunciated in the *Dougherty* case apply here. All of the other cases cited by the libellant were not rescue at sea cases, and, therefore, do not apply here. It is well settled that the United States is liable for its negligence in conducting a towage operation with resultant injury to the tow, or in conducting a salvage operation resulting in damage.

The differences between libellant and respondents Kowalski, now known as Stevens, and Zisa have been settled and releases exchanged between the parties. During the pendency of this suit, the Orion was owned by Paul Frank Zisa who consented to the sale of the vessel by the Marshal and to the depositing of the funds derived therefrom in the Registry of the Court. The sale produced $1,250.00 which now should be returned to Zisa, minus lawful deductions for Marshal's fees, disbursements, etc. The libel against the United States will be dismissed.

The foregoing opinion shall constitute findings of fact and conclusions of law as required by Rule 52.

An order may be submitted in conformity with the opinion herein expressed.

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* For an interesting discussion and criticism of the decision in this case, see Volume 14, NACCA Law Journal, pp. 405-407, which contains a further criticism of the decision which may be found in *"Liberal Construction" and the Tort Liability of the Federal Government*, by Professor Warren A. Seavey, Harvard Law Review, Volume 47, No. 6, April 19, 1954, pp. 994-996.

Supplemental Opinion

MODARELLI, *District Judge.*

On page 2 of my opinion filed January 2, 1957, I stated: "She claims that his death was caused by negligence on the operational level of the Coast Guard in the conduct of a sea rescue. Specifically, she charges that the Coast Guard Cutter used in the rescue was unseaworthy because it had a defective reverse mchanism, improperly secured life ring, and was improperly manned, all of which occurred on the shore and not at the time of the rescue at sea." I did not make any findings as to these charges for the reasons given in my original opinion.

I now feel that in order to make as complete a record as possible so that the case may be thoroughly presented on appeal, and particularly since our Supreme Court is constantly enlarging the doctrine of Government liability under the Federal Tort Claims Act, I should make findings in connection with the unseaworthiness of the Coast Guard Cutter and negligence on the operational level which may help to properly present this case to the Court of Appeals.

The evidence clearly established that there was a defective reverse mechanism, that the life rings were improperly secured, and that the Coast Guard Cutter was not in charge of a boatswain mate. It was further established that the customary and standard complement of the Coast Guard vessels, such as the one used here, usually consisted of a boatswain mate, engine man, and seaman. It was further established that boatswain mates were available but none were sent out on Coast Guard Cutter 36363. It was placed in charge of an engine man, third class, assisted by another Coast Guardsman whose regular assignment was largely maintenance of station equipment, and a young seaman.

The "Report of Assistance" in evidence, was made out by Richard W. Bove, the man in charge of the Coast Guard boat, within twenty-four hours after the occurrence of this unfortunate incident. It was duly endorsed and approved by his commanding officer at Sandy Hook Life Boat Station. It is there noted that Daniel Frank's loss of life was,

in their opinion, due to "a combination of the following circumstances:

"1. Equipment failure on Orion in that handrail carried away. 2. Inaccessibility of lifepreservers on Orion and failure of lifeboat crew to get lifepreservers free and throw to men in water. 3. Difficulty in maneuvering CG 36363 due to very rough weather and uncertainty of operator of reverse mechanism."

The records of the Coast Guard further disclosed that an effort had been made to repair this defective reverse clutch mechanism at its repair station at St. George, Staten Island, about six months prior to this incident. No doubt repairs were made but apparently in a negligent manner, for the mechanism was still unreliable and defective. Mr. M. J. Hacker, the officer in charge of the life boat station, testified that the unreliability of this reverse clutch mechanism was well known to the Coast Guard personnel at the Sandy Hook Life Boat Station and that the condition constituted a serious hindrance to the operational efficiency of the station. In the Coast Guard's Quarterly Boat Machinery Hull and Expense Report, dated March 31, 1952, more than two months prior to the accident, it was again reported by the personnel at the Sandy Hook Coast Guard Station that this very reverse clutch still was not reliable and that tightening it did not help, but the boat was still continued in operation. About a month prior to the accident involved here, one of the Coast Guardsmen in attempting to repair the reverse mechanism defect lost part of his finger, but the boat continued in operation. On May 29, 1952, about a week prior to the accident, the commanding officer of the Sandy Hook Life Boat Station wrote a letter to the Commander of the Third Coast Guard District, calling his attention to the fact that the Coast Guard Cutter 36363 had had these defects for over six months and that the repairs and/or replacements which were supposed to have been made in December, 1951, were still seriously needed, but the boat was still continued in operation without providing a replacement. When inquiry was made by the Court why this boat had not been replaced, I was

astounded to find out that the Coast Guard did not have another boat nor the funds to buy it with. Incredible. I, therefore, find that the failure to repair or properly replace this reverse clutch mechanism, or to provide a replacement boat, for over six months before the day of the accident and with Coast Guard's knowledge of this condition, constitutes gross negligence on its part; and I think the condition of Coast Guard Cutter 36363 on June 7 constitutes unseaworthiness. I think it was reasonably foreseeable and to be anticipated that this boat would be used in towing and rescue operations and that the success of its mission might depend on its being properly equipped, manned, and seaworthy.

Libellant contended that the rescue operation would have been successful had it not been for the shore-side gross negligence and unseaworthiness. But that is a conclusion that reasonable men might conscientiously and honestly differ on. I think it might be better put—that he might have been rescued not that he would have been. I suppose that the negligence on the operational level and the unseaworthiness of the vessel contributed in some degree to the death of the decedent. But to what extent I don't believe any human being can admeasure nor whether or not it was a substantial factor in the end result of the attempted rescue. At best, it would be almost a speculation. I am confronted here generally with the same dilemma as the court was confronted in the following cases: *Kirinicich* v. *Standard Dredging Co.*, 112 F. 2d 163 (C. A. 3, 1940); *Harris* v. *Pennsylvania Railroad Co.*, 50 F. 2d 867 (C. A. 4, 1931); *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. A. 2, 1925).

Since the accident herein occurred within a marine league of the New Jersey Coast, the New Jersey Wrongful Death Statute applies to supplement the General Maritime Law. *O'Leary, Admrx.* v. *United States Lines Co.*, 215 F. 2d 708 (C. A. 1, 1955). Respondent, United States of America, seriously urged that the decedent was guilty of contributory negligence, which under the New Jersey Death Act, if established, is a complete bar to recovery.

Opinion of the Court

(Filed December 16, 1957)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

* * *

Argued November 7, 1957

Before: MARIS, STALEY and HASTIE, *Circuit Judges.*

HASTIE, *Circuit Judge*:

Appellant is the administratrix of Daniel Frank who was drowned in the ocean very near the New Jersey shore under circumstances which, in appellant's view, obligate the United States to pay damages to Frank's dependents. Claiming that either negligence of employees of the government within the meaning of the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2674, or negligence of a public vessel covered by the Public Vessels Act, 43 STAT. 1112, 46 U. S. C. § 781, caused Frank's death, appellant filed this libel asserting that one of the above cited statutes, supplemented, as Congress has authorized, by the New Jersey Wrongful Death Act, N. J. S. A. § 2A:31-1, provides a legal basis for recovery against the United States.

Decedent was a passenger on a thirty foot cabin cruiser during a fishing expedition off the New Jersey coast. Returning in midafternoon, the cruiser became disabled, because of engine failure, and anchored less than four hundred yards off Sandy Hook. The weather was clear, but the velocity of the northwesterly wind had risen to about twenty-five miles per hour. In addition, there was a strong tidal rip running toward the shore and creating breaking waves four feet or more in height. Small craft warnings were flying from the Coast Guard Lifeboat Station at Sandy Hook. All but one of the Coast Guard boats suitable for towing the disabled cruiser were out assisting other craft in the rough seas. The only available boat, a

heavy motor lifeboat, was dispatched to assist the disabled cruiser and took it in tow.

During the tow Frank attempted to walk along the deck of the cruiser to the after cabin, holding a handrail as he proceeded. The cruiser heeled sharply, the handrail broke and Frank fell into the sea. The lifeboat crew immediately cut the tow line and made every effort to rescue Frank. However, he drowned before they could be of assistance to him.

Appellant contends that several derelictions of the Coast Guard were responsible causes of Frank's death. First, the lifeboat had a defective reverse gear which delayed it in reaching Frank after he fell into the sea. Second, the life rings in the lifeboat were so secured that they could not immediately be thrown overboard. Third, the crew of the lifeboat was less than the standard and customary Coast Guard complement.

The district court found for the United States on the ground that the plaintiff had not carried her burden of proving that the attempted rescue failed because of any of the faults of the Coast Guard. We agree that the United States was entitled to judgment, but place our affirmance on a different ground.

On appellant's own theory the effect of the alleged faults of the Coast Guard was to prevent its own rescue party from reaching the drowning man soon enough to save him. There has been no showing that any fault of the Coast Guard contributed in any way to Frank's falling into the sea. Nor did the Coast Guard in any way worsen his plight thereafter. In saying this we have not overlooked a suggestion on this appeal that the Coast Guard may have worsened Frank's position by taking the cruiser in tow. No such finding was made below and on the evidence such a finding could not reasonably have been made. The present claim must stand or fall on the theory that the Coast Guard was at fault solely in failing to get help to the decedent as soon as would have been the case had the rescue

vessel been in proper condition and properly equipped and manned.

If the United States is liable at all for negligence of the Coast Guard in connection with an attempted rescue operation, the responsibility of this public agency rises no higher than that of a private salvor. Upon that limitation the full bench of this court was agreed in *P. Dougherty Co.* v. *United States*, 3d Cir. 1953, 207 F. 2d 626, *cert. denied* 347 U. S. 912, although on other points we were divided. We recognized that the Coast Guard, like a private salvor, renders voluntary assistance where no duty to help is owed the person or vessel in distress. True, it is a statutory function of the Coast Guard to establish and operate rescue facilities. 14 U. S. C. § 2. Congress has also provided that the "Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized." 14 U. S. C. § 88(b). But this legislation falls short of creating a governmental duty of affirmative action owed to a person or vessel in distress. *Lacey* v. *United States*, D. C. Mass., 1951, 98 F. Supp. 219; see *Indian Towing Co.* v. *United States*, 1955, 350 U. S. 61, 69; *cf.* RESTATEMENT, TORTS, § 314. An obligation to render aid may grow out of a relationship such as master and servant or ship and crewman. *Kirincich* v. *Standard Dredging Co.*, 3d Cir., 1940, 112 F. 2d 163; *DiNicola* v. *Pennsylvania R.R.*, 2d Cir. 1946, 158 F. 2d 856; *Sadler* v. *Pensylvania R.R.*, 4th Cir., 1947, 159 F. 2d 784. But there is no such relational basis for a duty here.

In the absence of any duty creating relationship the responsibility of a volunteer is strictly limited. He may be liable if the injured person has been harmed because of reliance upon some representation concerning the voluntary service. *Indian Towing Co.* v. *United States*, *supra*. More generally, if an attempted rescue or other voluntary service is so conducted that it affirmatively injures the one in distress or worsens his positions, there may be lia-

bility. *United States* v. *Lawter*, 5th Cir., 1955, 219 F. 2d 559; *Eastern Air Lines* v. *Union Trust Co.*, D. C. Cir., 1955, 221 F. 2d 62, *aff'd per curiam*, 350 U. S. 907; Restatement, Torts, §§ 323, 324. But again, we have in this case none of these special liability creating factors. We have only a diligent rescue effort which proved ineffectual for lack of adequate equipment, preparation or personnel. For such ineffectual effort a private salvor is not liable. See the citation and elaborate analysis of the leading cases by Chief Judge Biggs, dissening in *P. Dougherty Co.* v. *United States*, *supra*, 207 F. 2d at 643-648. By parity of reasoning the United States also is relieved of liability in this case.

The judgment will be affirmed.

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Supreme Court of the United States

October Term, 1958

No. 604 MISC.

GRACE FRANK, Administratrix ad prosequendum of the Estate of DANIEL FRANK, deceased,
Petitioner,

against

UNITED STATES OF AMERICA, DANIEL F. KOWALSKI and CHARLES JANUSCZ,
Respondents,

and

DANIEL F. KOWALSKI, CHARLES JANUSCZ and the Cabin Cruiser SEA CAPTAIN, formerly known as the ORION, her engine, tackle, etc.,
Respondents-Impleaded,

and

PAUL F. ZISA, Claimant of the Cabin Cruiser, SEA CAPTAIN.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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and
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Of Counsel.

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REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

At page 11 of the brief in opposition to the petition, the Government states, in footnote 7, that even if the United States could be held liable for the failure of the Coast Guard to render assistance, nevertheless the petition should not be granted because the District Court allegedly found (Pet. App. 22) that petitioner had failed to establish the necessary "causative" relation between the alleged negligence and Frank's death.

It will be noted that the Trial Court's original opinion was devoted solely to the question of law involved in

this petition; and the supplemental opinion was primarily concerned with factual findings, in order that the record might be more complete on the appeal. It may be safely assumed that if it was the Trial Court's conclusion that there was no causal relationship between the fault and the resulting death, a simple statement to that effect would have obviated the necessity for any appeal or review by higher courts.

The thrust of the Trial Judge's conclusion, with regard to the question of causal relationship is found in the following sentence of the supplemental opinion: "I suppose that the negligence on the operational level and the unseaworthiness of the vessel contributed in some degree to the death of the decedent. * * * I am confronted here generally with the same dilemma as the Court was confronted in the following cases: *Kirinicich v. Standard Dredging Co.*, 112 F. 2d 163 (C. A. 3, 1940); *Harris v. Pennsylvania Railroad Co.*, 50 F. 2d 867 (C. A. 4, 1931); *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. A. 2, 1925)" (Pet. App. 22).

The Trial Court also observed that had it not been for the shoreside gross negligence and unseaworthiness, Daniel Frank "might have been rescued" and stated that it realized that this was "almost" a speculation. It is significant that the three cases which the Judge cited were all decisions in which that speculation was resolved in favor of the plaintiff or libellant. Indeed, the Trial Court had no alternative but to resolve this issue in favor of libellant, as it did, in view of the uncontradicted evidence.

Bove, the Coast Guardsman in charge of the lifeboat, testified (p. 43):

> "Q. At the time when Bauer went forward was your lifeboat close enough to throw a life ring to the two men in the water? A. Yes."

(Pages 44-45):

"Q. At the time when your lifeboat first came to the two men in the water, and you told us that you were unable to reverse, were you close enough to get next to the two men, if the reverse had been in proper operating order?"

(Colloquy deleted)

"A. Well, as I say, nobody can say what could happen. This is only in God's hands. But I say if I had a reverse I could have gotten that man."

Mr. Recker, another of the Coast Guardsmen in the lifeboat, testified as follows:

(Page 95):

"And then we started to make our passes to pick these two men out of the water. On our swing around it looked to me that they were both swimming, just waiting for us to effect the rescue. We made our first pass, but it was too far away. Then I was yelling to Bove to back it down, and I immediately knew what the trouble was, that it just wasn't going to back down. Then—

Q. Excuse me for interrupting you. At that particular point if the Coast Guard vessel had backed down, will you state an opinion, with a reasonable degree of certainty, whether the rescue could then have been effected? A. Yes, sir.

Q. What is your opinion? A. I am almost positive that if the clutch had been in proper operation we could have got both men.

The Court: Were you that close to them?
The Witness: Yes, sir."

(Page 98):

"Q. About a foot. Now, at that particular time, when you came for the life ring, were you close enough to the men to have thrown them the life ring if it had not been secured in the manner in which you have described and it had been in the

proper way? A. Yes. That's what I tried—when we made this first pass we could have effected the rescue if the boat had stopped, and it had been able to back down and hold it right there for a minute, and that life ring would have been free, I could have put the life ring approximately on top of both men. As it was, both men were in the water, one appeared to be just floating there, as if nothing was going on, he was just waiting for us to pick him up."

Coast Guardman Recker also testified that at first he was under the impression that the two men in the water were swimming, and later he saw Danny Frank submerge three times before said Danny Frank went down for the third and last time (pp. 99-100); that when the Coast Guard boat made its first pass, Daniel Frank appeared to be floating as if he were swimming, for he was spitting out of his mouth, and his eyes were open (p. 104).

The third Coast Guardsman, Mr. Bauer, testifying as a witness for the government, did not contradict the foregoing testimony. He confirmed that he had also tried to throw the life ring, but it had previously been so improperly secured, that he could not free it when it was needed (p. 196).

Mr. Hacker, the person in charge of the Coast Guard station, also testifying as a witness for the government, testified that in making out the official Coast Guard report of assistance within twenty-four hours after the occurrence (p. 253), he had interviewed his subordinate, Coast Guardsman Bove, and had agreed with his conclusions that inability to get the life preservers free on the Coast Guard vessel, so as to throw them to the men in the water, was one of the causes for the loss of life (p. 254). He further testified at page 255:

"Q. And another cause for the loss of life attributed by Bove in his official report to the Coast Guard was to the difficulty in maneuvering the C. G. 36363 due to very rough weather and uncertainty of

operator of reverse mechanism, is that right? A. That's right, yes.

Q. And you read that before you signed it and endorsed this report? A. Yes, sir.

Q. First-I wonder if you would be kind enough to tell me whether you agreed with those conclusions before you affixed your signature. A. Yes, sir."

Furthermore, the Trial Court's supplemental opinion points out that the "Report of Assistance" (which was placed in evidence, and which as stated above, was made out by the man in charge of the Coast Guard boat within twenty-four hours after the occurrence) noted that Daniel Frank's loss of life was due to "a combination of the following circumstances: 1. Equipment failure on Orion in that handrail carried away. 2. Inaccessibility of life preservers on Orion and failure of lifeboat crew to get life preservers free and thrown to men in water. 3. Difficulty in maneuvering C. G. 36363 due to very rough weather and uncertainty of operator of reverse mechanism".

It is, therefore, clear from the undisputed evidence in this case that Daniel Frank's loss of life was at least due to the Coast Guard's operational negligence in the manner in which the life preservers had been secured while its boat was ashore, as well as the well-known faulty mechanism of the Coast Guard boat.

The very cases cited by Judge Modarelli in his supplemental opinion showed that he was resolving that question of fact in favor of the libellant, and that he recognized that any other finding by him on that issue, would constitute reversible error.

The first case the Trial Court cited on the issue of causal relationship was *Kirinicich* v. *Standard Dredging Co.*, 112 F. (2d) 263 (C. A. 3rd, 1940), a case in which a worker on a dredge fell overboard at about 4 A. M. "The dawn had not yet lightened the darkness." Defendant's employees threw him some lines, but not a life preserver.

The Trial Judge dismissed the libel on the ground that there was no proof that the deceased would have been rescued had the life preserver been thrown to him. In his opening sentence, Circuit Judge Clark, on the appeal, labelled the decision of the Trial Court as "judicial stigmatism", and at page 164, he stated:

> "In the light, then, of this logic and these examples, would Kirinicich have drowned even if a larger and more buoyant object than the inch heaving line had been thrown within two feet of him? If he could swim, even badly, there would be no doubt. Assuming he could not, we think he might (the appropriate grammatical mood) have saved himself through the help of something which he could more easily grasp. We can take judicial notice of the instinct of self preservation that at first compensates for lack of skill. A drowning man comes to the surface and clutches at what he finds—hence the significance of size and buoyancy in life-saving apparatus."

The next case cited by Judge Modarelli under this point was *Harris* v. *Pennsylvania Railroad Co.*, 50 F. (2d) 866 (C. A. 4, 1931). In that case, a man fell from a carfloat. His cry was heard as he went into the water. After striking the water he reappeared on the surface of the water, and "seemed to be swimming or treading water", but then he went down and there were only some bubbles there. This also happened during the night. A line was thrown to him, but although a life ring was available, it was not thrown to him. The Trial Judge dismissed the case on the ground that "even if additional steps had been taken, it was still merely a matter of speculation as to whether the deceased would have been able to have availed himself of them so as to be saved." In reversing this decision, Circuit Judge Soper stated at page 869:

> "These obvious facts lead us to conclude that there was evidence of negligence on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had

been used. The deceased, even when last seen, was within 200 feet of the point at which a life ring, if promptly thrown, would have rested on the surface of the water. He was evidently making every possible effort to save himself. Whether in any event he would have succeeded is not a certainty, but in our view there was enough testimony tending to show a reasonable probability of rescue, had a life ring or heaving line been used, to justify the submission of the question to the jury."

In *Zinnel* v. *U. S. Shipping Board, etc.*, 10 F. (2d) 47 (C. A. 2, 1925), the Trial Judge had also dismissed a wrongful death action arising at sea. In reversing the decision of the Trial Court, Circuit Judge Hand stated at page 49:

> "There of course remains the question whether they might have also said that the fault caused the loss. About that we agree no certain conclusion was possible. Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it."

The liability of the government is not lessened by the fact that the Orion had a defective handrail, which caused Daniel Frank to be precipitated into the sea; nor is it relieved from liability because the seas had become choppy, thereby making the rescue attempt perhaps more difficult. As Judge Modarellii stated in his supplemental opinion in the suit at bar:

> "I think it was reasonably foreseeable and to be anticipated that this boat would be used in towing and rescue operations and that the success of its mission might depend on its being properly equipped, manned and seaworthy."

In *Chicago, Rock Island & Pacific R. Co.* v. *Goodson*, 242 F. (2d) 203 (C. A. 5, 1957), it was held that in a per-

sonal injury action, one need not prove that the negligent act of a defendant was the sole proximate cause for the accident. One may recover on a showing that it was reasonably foreseeable that a chain of causation might be set up in which a defendant's negligence, combined with other events, might cooperate in causing the resulting injury. Thus, Circuit Judge Tuttle stated at page 207:

> "As stated in *Hopson* v. *Gulf Oil Corp., supra*, cited by appellant in its brief:
>
> > 'In using foreseeableness as a test to determine proximate cause, this Court and the Courts of Civil Appeals have been careful to point out that for the defendant's negligence to be regarded as a proximate cause of the plaintiff's injury it is not necessary that the defendant should or would reasonably anticipate the very consequence or the exact nature of the plaintiff's injury or the precise manner of its infliction. It is sufficient that the defendant would reasonably have anticipated consequences or an injury of the general nature of that which ensued.'
> >
> > • • •
> >
> > 'The intervention of an unforeseen and unexpected cause is not sufficient to relieve a wrongdoer from consequences of negligence, if such negligence directly and proximately cooperates with the independent cause in the resulting injury.' (citing cases)
> >
> > 'What has just been said of course disposes of the contention that there should have been a charge on sole proximate cause.'"

See also *Dunham* v. *Village of Canisteo, et al.*, 303 N. Y. 498, 104 N. E. 2d 872 (1952), where the Court stated at page 504:

> "It is, of course, well settled in this State that when there are several proximate or efficient causes contributing to death, the death may be attributed to any or all of those causes" (citing cases and the Restatement of the Law of Torts, Section 879).

Conclusion

The issue here is clear. An important question of law is involved. The Government ought not to be permitted to avoid a review of this important issue by seeking to divert the attention of the Court from that point by suggesting that the Trial Court here had not found causal relationship. If the Trial Court had not found causal relationship, it would not have written two opinions, nor would it have cited cases which resolved that question in each instance in favor of the person whose life would probably have been saved, had it not been for the negligence or fault involved.

Dated: New York, New York

Respectfully submitted,

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and
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 604 MISC.

GRACE FRANK, Administratrix ad Prosequendum of the Estate of DANIEL FRANK, Deceased, PETITIONER,

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinion of the United States District Court for the District of New Jersey (Pet. App. 17-23) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 23-26) is reported at 250 F. 2d 178.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1957.[1] The petition for a writ of

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[1] A copy of this judgment has not been made a part of the record filed by the petitioner in this Court. The filed record consists solely of the petitioner's appendix in the Court of Appeals, which was restricted to the opinion and supplemental opinion of the District Court's. The appendix to the petition for a writ of certiorari contains, in addition, the opinion of the Court of Appeals (Pet. App. 23-26).

certiorari was filed on March 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the liability of the United States, under the Tort Claims Act or the Public Vessels Act, for alleged negligence in the conduct of a Coast Guard rescue operation is greater than the liability of a private salvor in like circumstances.

2. Whether a private salvor would be liable for negligence resulting in inability to rescue a drowning man, where the drowning man's peril was not brought about or increased by the salvor.

STATUTES INVOLVED

(*1*). The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b):

> * * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the

same manner and to the same extent as a private individual under like circumstances * * *.

* * * * *

28 U.S.C. 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

* * * * *

(2). Section 1 of the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, provides as follows:

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

(3). The Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 742, 743, provides in pertinent part:

Section 2:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be

maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * *. * * *

Section 3:

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * *

STATEMENT

Petitioner, as administratrix of the estate of her son, Daniel Frank, brought this action to recover damages from the United States for his allegedly wrongful death. The complaint asserted a cause of action under both the Federal Tort Claims Act and the Public Vessels Act, *supra*, pp. 2-3, as supplemented by the New Jersey Wrongful Death Act, N.J.S.A., Section 2A:31-1 (Pet. App. 23). Both courts below held that petitioner's evidence did not establish liability on the part of the United States. The pertinent facts may be summarized as follows:

On June 7, 1952, Frank was a passenger aboard the thirty-foot cabin cruiser Orion. At approximately 2:30 p.m., having become disabled due to engine failure, the Orion was forced to anchor at a point less than 400 yards off Sandy Hook, New Jersey. While the weather was clear, 25-mile-per-hour winds, accompanied by a strong tidal rip, produced breaking waves 4 feet or more in height. The Coast Guard Lifeboat Station at Sandy Hook was flying small-craft warnings and, by that time, had sent to the assistance of other craft in that area all but one of its boats suitable for towing. Upon being apprised that the Orion was in distress, the

Coast Guard sent the remaining boat, a heavy motor lifeboat, to render assistance. (Pet. App. 17, 23-24.)

When the lifeboat arrived alongside of the Orion, Frank was on the forward deck of the cruiser. In spite of the roughness of the water, he had not donned one of the life preservers which were on board. (Pet. App. 18.)

A tow line was passed from the lifeboat and, when it had been secured to a forward deck cleat of the cruiser, the towing operation commenced. Shortly thereafter, Frank attempted to make his way aft, along the side deck of the cruiser, to the cabin, holding on to a handrail on the boat's cabin top. Before he could reach the cabin, the cruiser lurched, the handrail ripped loose and Frank fell into the water. The lifeboat crew immediately cut the towline and made every effort to rescue Frank. He drowned, however, before they could reach him. (Pet. App. 16, 24.)

In her complaint, petitioner alleged as a basis for imposing liability on the Government that (1) the lifeboat had a defective reverse gear which delayed it in reaching Frank after he had fallen overboard; (2) the life rings in the lifeboat were secured in such a fashion that they could not be immediately thrown overboard; and (3) the lifeboat crew was sub-standard (Pet. App. 24). After trial, the District Court entered a memorandum opinion in which it exonerated the United States on the authority of *P. Dougherty Co. v. United States*, 207 F. 2d 626 (C.A. 3), certiorari denied, 347 U.S. 912 (Pet. App. 17-19). In a supplemental opinion (Pet. App. 20-22), the court held that, although the lifeboat was unseaworthy and the Government was guilty of "gross negligence" in failing to repair the clutch, the petitioner had not established that this negligence was the proximate cause of Frank's drown-

ing. In this connection, the court pointed out that it was entirely conjectural whether the defective condition of the lifeboat "was a substantial factor in the end result of the attempted rescue." (Pet. App. 22.)

The Court of Appeals affirmed on a different ground. It noted that "[o]n [petitioner's] own theory the effect of the alleged faults of the Coast Guard was to prevent its own rescue party from reaching the drowning man soon enough to save him" and that "[t]here has been no showing that any fault of the Coast Guard contributed in any way to Frank's falling into the sea" or that "the Coast Guard in any way worsen[ed] his plight thereafter." (Pet. App. 24.) It then held that the responsibility of the Coast Guard with respect to the attempted rescue operations "rises no higher than that of a private salvor" (Pet. App. 25) and that the salvor is not liable for "a diligent rescue effort which proved ineffectual for lack of adequate equipment, preparation or personnel" (Pet. App. 26).

ARGUMENT

The Court of Appeals correctly held that the appropriate standard of reference is the body of principles governing the tort liability of private salvors, and that such a salvor would not be liable in the circumstances of this case. Contrary to petitioner's position, there is no conflict with decisions of this Court or of other courts of appeals. Accordingly, there is no occasion for further review.

1. The express language of both the Tort Claims Acts and the Public Vessels Act [2] discloses a clear con-

[2] The Tort Claims Act (28 U.S.C. 2680(d), *supra*) expressly excludes any claims cognizable under the Suits in Admiralty Act and the Public Vessels Act. Since the complaint is based, *inter alia*,

gressional purpose to equate (subject to certain exceptions not now relevant) the tort liability of the United States with that of a similarly situated private individual. The former provides that the United States shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674, *supra*) and "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b), *supra*). Section 3 of the Suits in Admiralty Act, *supra*, which is incorporated by reference in Section 2 of the Public Vessels Act (46 U.S.C. 782, 43 Stat. 1112), provides that "suits [against the United States] shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

As petitioner implicitly concedes, the closest private analogy to Coast Guard rescue undertakings is found in the activities of private salvors. By definition, a salvor is one who gratuitously and without prior obligation undertakes to salve property or life and property at sea. Robinson, *Admiralty* (1939), pp. 709, 720. Similarly, the Coast Guard has no legal duty to undertake any particular salvage or rescue operation, any more than it has a duty to "undertake [a] lighthouse service." Cf. *Indian Towing Co.* v. *United States*, 350 U.S.

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on the unseaworthiness of a Government vessel and the failure of Government personnel to effect a rescue at sea, it would appear to be based on a maritime cause of action falling within the exclusive waiver of immunity of the Public Vessels Act. However, as we shall see (*infra*, pp. 8-11), there could be no recovery against the United States here, regardless of which statute is applicable.

61, 69; *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.).[3] There is, of course, one distinction between the private salvor and the Coast Guard:—the latter and its personnel do not now claim, nor have they ever claimed, salvage. See *The Borgfred*, 1936 A.M.C. 804, 810 (D. V.I.); *Thornton* v. *The Livingston Roe*, 90 F. Supp. 342, 345 (S.D.N.Y.), citing *Firemen's Charitable Ass'n.* v. *Ross*, 60 Fed. 456 (C.A. 5); *Davey* v. *The Mary Frost*, 7 Fed. Cas. 14, No. 3,592 (C.C., E.D. Tex.); *The Belle*, 165 Eng. Rep. 1034; *The Aquila*, 165 Eng. Rep. 87, 90-91; see also *Murphy* v. *Ship Suliote*, 5 Fed. 99 (C.C., D. La.). But this consideration hardly affords a basis for holding the Coast Guard to a greater liability than that imposed upon the private salvor.

2. As the Court of Appeals indicated, petitioner's claim for recovery is based solely on the theory that the Coast Guard's negligence rendered its own rescue efforts ineffectual. Otherwise stated, it is plain that the Coast Guard was in no way responsible for Frank's position of peril and in no way worsened his plight.

It is quite clear that a private salvor would not be liable in these circumstances. Unless he has deterred other available rescuers, a salvor can be held liable only

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[3] Aids to navigation (such as the lighthouse involved in *Indian Towing*) are maintained by the Coast Guard under the authority of 14 U.S.C. 81, which provides in relevant part that "[i]n order to aid navigation and to prevent disasters, collisions, and wrecks of vessels * * * the Coast Guard *may* establish, maintain, and operate: (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States * * *." (Emphasis added.) The rescue service is authorized by 14 U.S.C. 88, which provides in relevant part that "[i]n order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction * * * the Coast Guard *may*: (1) perform any and all acts necessary to rescue and aid persons and protect and save property; * * *." (Emphasis added.)

for negligence which inflicts a "distinguishable" or "independent" injury on the salvaged vessel or its crew. *The S.C. Schenk*, 158 Fed. 54, 60 (C.A. 6); *The Minnie E. Kelton*, 181 Fed. 237 (D. Ore.). If the effect of the salvor's negligence is merely to defeat his own salvage attempt, leaving the vessel and its crew in no worse condition than before, there can be no liability, and at most the salvor forfeits all or a part of his salvage award.

Specifically, the salvor is not liable merely because he fails to exercise a degree of skill which he does not possess.[4] Nor is he liable for employing equipment in poor repair, when he does not have equipment in good repair at hand. See *Restatement of Torts*, § 324, p. 878. This follows from the fact that he owes no duty to those he attempts to assist to have mastered certain skills previously, or to possess or to maintain any particular type or condition of equipment. *The Allegiance*, 1 Fed. Cas. 431, No. 207 (D. Ore.); *The S. C. Schenk*, 158 Fed. 54 (C.A. 6); *Dorrington* v. *City of Detroit*, 223 Fed. 232 (C.A. 6); *The Cape Race*, 18 F. 2d 79 (C.A. 2); *The Henry Steers, Jr.*, 110 Fed. 578 (E.D.N.Y.); *The Minnie E. Kelton*, 181 Fed. 237 (D. Ore.).

In *The S.C. Schenk*, for example, a harbor tug undertook to salve a barge drifting powerless on a lee shore. The tow line slipped from the tug's tow posts and, as a result, the barge stranded. There was evidence that the line had been improperly secured on the posts by inexperienced crewmen employed by the tug's master because of a strike. The Sixth Circuit held that the tug was not liable to the barge's owner, since (1) she had

[4] The trial court expressly found that the crew of the Coast Guard vessel "exercised all of the skill and learning which they possessed to effect the rescue of * * * Frank" (Pet. App. 18).

made use of what equipment and personnel she had available and (2) no other potential salvor had been prevented from assisting the barge by the tug's intervention. It is to be noted that, since the tug was employed in general harbor work, her master and regular crew held themselves out as experts in towing and salvage operations. Yet the tug was not liable for its inexperienced crewmen in a salvage-towing operation, since she had done the best that she could with the crew available in the prevailing circumstances.

3. Petitioner's assertion (Pet. 10) that the decision below is in conflict with *United States* v. *Lawter*, 219 F. 2d 559 (C.A. 5), is without merit. As the Court of Appeals pointed out (Pet. App. 25-26), the Government was held liable in *Lawter* because the negligent performance of the rescue operation worsened the position of the decedent; indeed, that negligence had subjected the decedent to the peril which occasioned her death. Moreover, the attempted rescue by the Coast Guard had deterred other potential rescuers from offering their services. In this case, as already noted, the Coast Guard's alleged negligence played no part in placing Frank in his position of danger. To the contrary, his presence in the water was the result of either his failure to take reasonable precautions for his own safety, or of the condition of the cruiser on which he was a guest. The Coast Guard is charged solely with not having rendered timely assistance to him, once his life had thus been put in jeopardy.

Nor is there basis for petitioner's assertion (Pet. 10-11) that the decision below is inconsistent with *Indian Towing Co.* v. *United States*, 350 U.S. 61, and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215. In *Indian*

Towing, the complaint alleged that the plaintiff's barge had run aground because of its reliance on a negligently maintained, and inoperative, navigational aid. This Court held that, when the Coast Guard engenders reliance on the guidance afforded by a lighthouse, it must exercise due care to insure that injury does not flow from that reliance.[5] And in *Canadian Aviator*, a private vessel, following directly astern of a naval patrol boat under instructions from naval authorities, struck a submerged wreck. The Court held the Government liable under the Public Vessels Act on the basis of the settled principle of admiralty law that, where a tug negligently grounds its tow, the tug and its owner are liable for the resultant damages.[6] The principles discussed above, regarding the nonliability of salvors in the circumstances of the present case, are no less settled.[7]

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[5] Apart from the fact that Frank's presence in the water was in no way attributable to a reliance on the Coast Guard rescue service, the Coast Guard does not represent, expressly or impliedly, that it will at all times have experienced personnel and functioning equipment available to answer a particular distress call. Needless to say, budgetary limitations, coupled with the demands placed upon the Coast Guard during a period of adverse weather conditions, would preclude any such representation.

[6] This Court deemed the private vessel to have been in constructive tow.

[7] Even if there were circumstances in which the United States could be held liable for the allegedly negligent failure of the Coast Guard to render assistance, petitioner's position would not be improved. As the District Court correctly found (Pet. App. 22), petitioner failed to establish the necessary "causative" relation between the alleged negligence and Frank's death, *i.e.*, that the rescue operation would have been successful in the absence of that negligence. Cf. Prosser, *Torts* (2d ed.), § 41.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.